

Communication with juries

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1. On the last Tuesday of October 2007 I met Mr Makoto Ibusuki, a Japanese academic who is in Sydney to study aspects of the Australian criminal justice system.
2. Mr Ibusuki is one of a number of Japanese legal academics, barristers and judges who have spent time here in recent years absorbing what they can learn from our courts.
3. In Japan, the administration of criminal justice has a problem, which is that 99 per cent of prosecutions result in a conviction. Everyone recognises that this is a problem, from political constituencies all the way, even, to prosecutors. When a criminal prosecution has a near certainty of success, the system suffers from a fundamental lack of credibility.
4. Mr Ibusuki's current area of interest is the audio recording of police interviews, which is not yet mandatory in Japan, where a written record of a police interview suffices in the criminal courts.
5. The major field of study for these visitors has been our jury system. In Japan, next year will see an introduction of a new criminal jury system to replace judges sitting alone. The 'Saiban-In' system will introduce a jury of three judges and six laypeople, replacing judge-alone trials. Decisions will be made by bare majority, but that majority must include at least one of the three judges.
6. For seventeen years, Japanese academics and practitioners have been traveling the world modeling a new jury system, cherry-picking the best of what they can find in Europe, the USA and Australia. I was invited to a symposium last year in Osaka, where professionals and members of the public picked my brain as a representative of the lay juror's point of view. Needless to say, they are great admirers of our jury system.

7. But there was an important aspect of the truth that I didn't want to say too much about, which is that our admired jury system is suffering a steady attritional attack, and that the public may be losing confidence in it. As one country fights to restore one of the central planks of democracy, another is in danger of letting it rot away.

8. Our jury system, as an issue for debate, only seems to make it into the public domain when it fails, or more precisely when it seems to fail. When a jury is discharged because a juror has gone to a crime scene and done an investigation of their own, the jury system is said to have failed.

9. Hung juries always make headlines. Invariably they are seen as an obstruction to justice, and a failure. When a jury hung on one of the Bruce Burrell murder trials in NSW, media reported that there was only one holdout. But did we know if that holdout was for conviction or acquittal? Nobody outside the jury knew for sure, but it was immediately assumed that the holdout stopped a conviction.

10. Hung juries are seen as malfunctions, not least by the jurors themselves, who believe that they have wasted the court's and their own time. They tend not to be told that Sir William Deane, in the *Black* case in the High Court, said that 'a juror who conscientiously holds out against a majority and thereby prevents unanimity has not failed properly to do what [he or she was] chosen to do. To the contrary, he or she has done no more than discharge his or her duty to both the accused and society'. The US Supreme Court in 1962 said 'a mistrial from a hung jury is a safeguard to liberty' and 'nothing should interfere with its exercise'.

11. Yet we have interfered with its exercise, by introducing majority verdicts. Even though an exhaustive study by the Law Reform Commission here in New South Wales two years ago recommended the retention of the unanimity requirement, the State government listened to other voices in the community and moved to majority verdicts.

12. In the last few weeks, I have taken a sample of media reports about juries. In one, the Chief Justice of the United Kingdom criticised counsel and judges for their incoherent addresses to juries, saying the commonsense of the juror should be given more trust. Nevertheless, the headline to the story in the Sydney Morning Herald was: 'Juries confused'.

13. Research by the Australian Institute of Criminology showed that 10 per cent of rape trials before juries ended with a conviction. The headline,

and the copy within the Daily Telegraph's story, both inserted the word 'only'. 'Jury convictions *only* 10pc in rape cases', was a headline, implying jury failure. 'Jurors have usually made up their mind in rape trials before they even hear the evidence, research shows', said the Telegraph. Well, no, the evidence did not show that. The evidence showed that jurors – surprise, surprise – brought their background knowledge and beliefs into a trial. I thought that was the whole reason we had juries.

14. Very low down, almost invisible, in one story was this comment by the executive officer of the Canberra Rape Crisis Centre, Veronica Wensing: 'Without the jury process, we're leaving the process in the hands of individuals, which is far riskier.'

15. A story which could and should have been positive about the jury system was turned into an attack on it.

16. Similarly, reporting of a study by the Perth practitioner and academic, Judith Fordham, similarly highlighted the instances where juries had gone wrong. The most attention was given to stories about jurors who had carried out their own investigations, by visiting a crime scene or one enterprising juror conducting an experiment with model cars.

17. It is no news, of course, to complain that media highlight dysfunction. It would also be hypocritical. As a journalist, I know that the essence of a good story is conflict, and there is limited appetite among news editors for a story saying that judges and juries mostly get it right. Being the truth doesn't necessarily make it news.

18. Judges, of all people, know about the media's willingness to go on the attack where something is perceived to have gone wrong. But when comparing media attacks on judges with media attacks on juries, I would say there is a significant difference. When a judge is attacked, nobody is arguing that the bench should be abolished. Individual judges are picked on, very often unfairly, but the institution remains unassailable.

19. When jury verdicts or discharged juries are attacked, on the other hand, it is the jury system that suffers. The individual jury is not hung out to dry. A perceived problem with an individual jury, or even an individual juror, is taken as a systemic problem.

20. Partly this is a result of jurors' anonymity. Media can personalise an attack on a judge, but jurors are unknown and so the criticism is diverted to the system. But I would say there is more to it than that. I would say that there is a fundamental distrust of our fellow citizens, a default position where we think everyone else is an idiot. It is summarised in the saying that if you're innocent of a crime it's best to be tried by a judge, but if you're guilty it's best to have a jury. In other words, juries are more likely to get it wrong.

21. This misconception, or mistrust, in my experience and research lasts only until the critic reaches the jury room door. That is to say: the best education is experience.

22. When I became a juror on a solicitor murder trial in 2001, I belonged to the scornful peanut gallery. Would I want to be tried by a jury? Only if I was guilty. Did I have any faith in my fellow citizen? No way. Did I believe court processes were too complicated, and the outcomes too important, to be left to people dragged in from the street? Yes, I did. I cleaved to Mark Twain's observation: 'We have a criminal system which is superior to any in the world and its efficiency is only marred by the difficulty of finding twelve men every day who don't know anything and can't read.'

23. My narrative, however, was one of conversion. What I saw was twelve people, including myself, who took the process so seriously that we rose above our prejudices, we tightened the slack in our thinking, we were embarrassed to appear sloppy or biased in front of the other eleven, and we worked through the evidence together in a civil, logical and cooperative way to reach a verdict. While we were all ignorant about finer legal and technical points, we understood that our role was to make a finding of fact. We understood that our 'background experience', the diverse knowledge and even preconceptions that we brought to the court, were nothing to be ashamed of. That was why we were there. That was our strength.

24. This jury experience – the harmonious, conscientious, responsible jury – is by far the majority experience. Every jury study that has asked the question has found that judges and counsel agree with the jury's verdict in nearly all cases. (I point you to Michael Chesterman's 2001 study for the University of New South Wales as a clear validation of the jury system as measured by the safety of their verdicts.)

25. Yet the good news about juries is kept in the bottle. So that jurors may not say anything to challenge the safety of the verdict, our Jury Act stops jurors from saying anything to *reinforce* the safety of the verdict. The secrecy surrounding jurors must in my view be loosened, to allow jurors to give useful feedback to courts and practitioners in a way that will help them improve the way they do their work. Setting up an appropriate post-trial forum, some time after the heat of the moment has passed, for jurors, judges and barristers to conference would be of great mutual benefit.

26. The benefit for jurors would be so they can get things off their chest. Being a juror can be a traumatic time, even when things go well. Jurors can feel frightened and isolated, particularly after they are cast back out into the world.

27. But I feel that such conferences would be of even more value to the courts.

28. Every juror's biggest problem in every trial is the judge. Now I say this carefully. The juror's biggest problem is the judge. If the judge is helpful, clear, fair and considerate, then that problem is negligible. The judge's role is to get out of the way between the jury and a clear sight of the facts. I don't believe a good judge should be seen as an asset to the jury. The best judge is one who gets out of the jury's way. A problem judge is one who – obviously – distorts the facts or the process, but that is taken care of by the appeals process. From the juror's point of view, a problem judge is one who treats the jury as children, or idiots; who is discourteous in the way he or she brings the jury in and out of the court for legal argument; who does not inform the jury of their rights; who is unapproachable. The problem judge, or the problem court, is the one which makes it harder for the jurors to do their job. That is why, in my book, I wrote passionately about apparently inconsequential matters such as the food jurors are served, the amount they are paid, the condition of their deliberation rooms, the access to transcripts and so on. These may seem peripheral matters. But they are not. They go directly to the jury's ability to deliver a safe verdict.

29. My greatest fear for the jury system is that it will be allowed to wither on the vine, in slow motion, so that we don't even notice its decline. Already, piece by piece, juries have lost their involvement in different types of trials, including all civil matters except the first stage of defamation trials. They have lost the special quality of deliberation that is encapsulated in the requirement for a unanimous verdict. More

fundamentally, they are losing the confidence of lawmakers. The alternative to juries is a judge sitting alone. Anyone who actively wishes for that must be examined with extreme skepticism. I believe that prejudice, selective deafness, bad temper, and a tendency to quick and unfair judgment are much more likely to be found concentrated in one person than they are to be shared by twelve. Moreover, it is only to the bench's benefit if verdicts are underwritten by community involvement. The prime role of a jury is to increase public confidence in the criminal system's connection with common sense and the bases of reality that common people agree upon.

30. My fear is that the community will only recognise the value of the jury system after it has lost it, and we find ourselves with a criminal justice process that has lost all public confidence. Then, like the Japanese, we will have to start building up this democratic right, once again, from scratch.